In the Supreme Court of Missouri

No. SC87057

STATE OF MISSOURI, ex. rel.
Memorial Park Cemetery
Association of Mo.,
and
Henry W. DeVry, III,
and
Mark H. Bailey,

Relators

vs.

HON. RANDALL R. JACKSON
Judge, Division 1
Circuit Court
Buchanan County, Missouri,

***Respondent*.**

RELATORS' BRIEF IN SUPPORT OF WRIT OF MANDAMUS

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The action involves determination of venue pursuant to ' 508.010 RSMo. (2004). The action also involves issuance of an original remedial writ, and this Court=s supervisory authority over the lower courts of the State. After motion for transfer to a proper venue was denied in the Circuit Court of Buchanan County, Missouri, Relators exhausted their remedies in the Missouri Court of Appeals, pursuant to Rule 84.22(a) (Appx. A11; Exhibits K & M). The Supreme Court of Missouri has jurisdiction pursuant to Mo. Const. Art. V, ' 4 (Appx.A1).

STATEMENT OF FACTS

Plaintiffs filed their petition in Buchanan County on April 4, 2005 (Exhibit A).[1] Relator Defendant Mark H. Bailey (hereinafter "Bailey") filed his motion to transfer venue (with answer and counterclaim) on May 20, 2005 (Exhibit B). On May 23, 2005, Relator Defendants Memorial Park Cemetery Association of Mo. and Henry W. DeVry, III (jointly herein as "Park Lawn Funeral Home" or "Park Lawn") filed their motion to transfer venue (with their motion to dismiss for failure to state a claim upon which relief can be granted, and answer) (Exhibit C).

On May 24, 2005, Park Lawn set its motion to transfer venue for hearing June 15, 2005 (Exhibit D). On June 2, Plaintiffs filed their opposition to the Defendants' motions (Exhibit E). On the same day, Plaintiffs filed a motion to amend their petition (Exhibit F) to add claims in attempt to establish venue in Buchanan County (Exhibit G-187: 2-5).

Plaintiffs then set their motion to amend for hearing at the same time as Defendants' motions, June 15, 2005 (Exhibit D). Plaintiffs' response to Defendants' motion to transfer venue did not dispute that venue was improper in Buchanan County (Exhibit E). At the June 15, 2005 hearing, Plaintiffs stipulated that venue was improper in Buchanan County as the case stood when brought (Exhibit G-184: 3-12; 191:13-18). It is uncontested that none of the three named defendants reside in Buchanan County. *Id.* It is also undisputed by the parties that the

[1]Lettered Exhibits refer to separately bound exhibits filed previously with this Court as part of the writ petition.

only proper venues for Plaintiffs= case when it was brought are the circuit courts of Clinton, Clay, or Jackson Counties (Exhibits C & E).

Defendant Relators contested Plaintiffs= motion for leave to amend on grounds that the trial court has no jurisdiction to act on the motion, and Plaintiffs= proposed amended petition fails to state a claim for which venue is proper in Buchanan County (Exhibits C, H & I; G-184: 3-25; 186: 7-12). Respondent Judge Jackson issued a one-page order dated July 7, 2005 denying Defendants= motions to transfer venue, and granting Plaintiffs= contested motion to amend (Exhibit J).

On July 14, 2005, to prevent proceeding in an improper venue and to compel Respondent to perform the ministerial act required by 476.410 RSMo. (Appx. A2) and Rule 51.045 (Appx. A5), Defendants filed a petition for (and suggestions in support of) original writs of prohibition and mandamus in the Missouri Court of Appeals for the Western District (Exhibit K). Plaintiffs filed suggestions in opposition to the writs on July 22, 2005 (Exhibit L). On August 3, 2005 Defendants= petition for writs was denied by the Writ Division without opinion (Exhibit M).

This Court issued its Alternative Writ of Mandamus September 20, 2005.

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE VENUE IS IMPROPER IN BUCHANAN COUNTY (A FUNDAMENTAL DEFECT), IN THAT VENUE IS TO BE DETERMINED AS THE CASE STANDS WHEN BROUGHT.

State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

State ex rel. Green v. Neill, 127 S.W.3d 677 (Mo. 2004)

State v. Lingar, 726 S.W.2d 728 (Mo. 1987)

' 508.010 RSMo.

' 476.410 RSMo.

Rule 51.045

II. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE THE RELATION BACK DOCTRINE DOES NOT ALTER DETERMINATION OF VENUE AS CASES STAND WHEN BROUGHT, IN THAT RELATION BACK DEALS WITH CHANGES OF PARTIES, NOT CLAIMS, AND DEALS WITH STATUTES OF LIMITATION, NOT VENUE.

Bailey v. Innovative Management & Inv., 890 S.W.2d 648 (Mo. 1994)

Windscheffel v. Benoit, 646 S.W.2d 354 (Mo. 1983)

State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

' 508.010 RSMo.

Rule 55.33(c)

III. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIM WOULD NOT ACCRUE IN BUCHANAN COUNTY, IN THAT A CAUSE OF ACTION "ACCRUES" WHEN THE RIGHT TO MAINTAIN A SUIT ARISES, AT THE PLACE WHERE THE WRONGFUL CONDUCT CAUSING INJURY OR DAMAGE OCCURRED.

Trimble v. Pracna, 167 S.W.3d 706 (Mo. 2005)

Brink v. Kansas City, 358 Mo. 845, 850 (1949)

Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. banc 1984)

IV. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM OF FRAUDULENT INDUCEMENT, IN THAT A BREACH OF CONTRACT CLAIM CANNOT BE CONVERTED INTO A TORT AND PLAINTIFFS CANNOT STATE FRAUD WITH PARTICULARITY, CANNOT STATE DAMAGES, AND CANNOT STATE JUSTIFIABLE RELIANCE.

Yerington v. Riss, 374 S.W.2d 52 (Mo. 1964)

O'Neal v. Stifel, Nicolaus & Co., 996 S.W.2d 700 (Mo. Ct. App. 1999)

Hoag v. McBride & Son Inv. Co., 967 S.W.2d 157, 174 (Mo. Ct. App. 1998)

ARGUMENT AND AUTHORITIES

I. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE VENUE IS IMPROPER IN BUCHANAN COUNTY (A FUNDAMENTAL DEFECT), IN THAT VENUE IS TO BE DETERMINED AS THE CASE STANDS WHEN BROUGHT.

A. Venue Generally

Venue is a designation of the location or geographical situs where the court has jurisdiction to act in a particular lawsuit. *State ex rel. Rothermich v. Gallagher,* 816 S.W.2d 194, 196 (Mo. banc 1991). Venue in Missouri is determined solely by statute. *Id.* The applicable statute is ' 508.010 RSMo. (Appx. A3). *State ex rel. DePaul Health Ctr. v. Mummert,* 870 S.W.2d 820, 822 (Mo. 1994). The purpose of the venue statute is to provide a convenient, logical, and orderly forum for litigation. *State ex rel. Linthicum v. Calvin,* 57 S.W.3d 855, 857 (Mo. banc 2001); *Litzinger v. Pulitzer Publishing Co.*, 356 S.W.2d 81, 88 (Mo. 1962) (trial court cannot foreclose the defendant of its right to proper venue).

The law in Missouri is clear B improper venue is a fundamental defect. *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. 2004) (citing *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002)). A court that acts when venue is improper acts in excess of its jurisdiction. *Id.*

B. Determination of Venue

In *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994) (Limbaugh, J. dissenting) this Court first determined that, pursuant to Missouri statute, venue is determined as the case stands when brought, not when a motion challenging venue is decided.

Id. at 823.

Subsequently, the Court expanded the definition of when a case is Abrought@ to include whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001) (White, J., dissenting; Stith, Wolff, J.J., joining in dissent).

The terms Acommenced@ and Abrought@ are commonly deemed to be synonymous. *Id.* at 858. For purposes of the venue statute, a suit instituted by summons is Abrought@ whenever a plaintiff brings a defendant into a lawsuit. *Id.* Plaintiffs= motion to amend and proposed amended petition did not seek to add any new defendants (Exhibit F). Therefore, Plaintiffs= lawsuit was Abrought@ for venue determination purposes when Plaintiffs filed their original petition. *Id.*

It is undisputed that none of the three named defendants reside in Buchanan County, and venue is improper in Buchanan County as the case stood when brought (Exhibit G-184: 3-12; 191:13-18). Where venue is improper, the trial court has no jurisdiction to do anything but perform the ministerial act of transferring the case to a proper venue. *Green*, at 678. Respondent did not address Defendants= citations to the law prohibiting his further action (Exhibit J). Despite established law to the contrary, the trial court ruled on a contested motion, in an improper venue, to give itself jurisdiction, without having the jurisdiction to do so. *Id.*

If Respondent would have had jurisdiction to rule on a motion to amend, he, nevertheless, would have had to determine venue as of the original filing. *Linthicum*, at 857.

Now Plaintiffs, on behalf of Respondent, seek to further expand the definition of when a case is Abrought@ to include whenever a plaintiff chooses a new theory of recovery B even after

the action has previously been brought against the same defendants. Such an interpretation belies the reasoning upon which *Linthicum* was based. *Linthicum* held that A[a]lthough a suit is >brought= against the original defendants when the petition is initially filed, in like manner, it is also >brought= against subsequent defendants when they are added to the lawsuit by amendment.@ *Id.* at 858. An amended claim against an existing defendant is not Abrought@ by summons, pursuant to ' 508.010 RSMo.

Moreover, subsequent opinions evaluating *Linthicum* suggest that only defendants B not plaintiffs B may challenge the basis for venue after amendment. See *State ex rel. Budd Co. v. O'Malley*, 114 S.W.3d 266, 271 (Mo. Ct. App. 2002) (either defendant may challenge venue after a defendant is added); and see *State ex rel. Landstar Ranger v. Dean*, 62 S.W.3d 405, 406 (Mo. 2001) (White, J., dissenting: *Linthicum* holds Missouri resident defendants entitled to challenge venue at the time of joinder).

C. Mandamus Is Appropriate Remedy When Venue Is Improper and a Court Fails to Perform the Ministerial Duty of Transfer to a Proper Venue.

When venue is improper, the circuit court judge has a duty to transfer the case to a court of proper venue. 476.410 RSMo.; Rule 51.045. A writ of mandamus is the appropriate remedy to require the performance of this ministerial act. *DePaul*, at 823; *State ex rel. Bunker Res. v. Dierker*, 955 S.W.2d 931, 933 (Mo. 1997); *State ex rel. Turnbow v. Schroeder*, 124 S.W.3d 1, 3 (Mo. Ct. App. 2003).

If the writ of mandamus is not made peremptory in this case, Defendants will suffer irreparable harm because improper venue is a fundamental defect. *Green*, at 678; *State v. Lingar*, 726 S.W.2d 728, 732 n3 (Mo. 1987). Defendants would have no remedy at law to

prevent proceeding in an improper venue. *State ex rel. Berbiglia, Inc. v. Randall*, 423 S.W.2d 765, 770 (Mo. 1968). Respondent=s act of ruling on a contested motion when he has no jurisdiction to do so, is an exercise of extra-judicial power. *Green*, at 678; and see *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998).

On one hand Plaintiffs argue that mandamus should not lie because Defendants have no clearly established and presently existing right as determined by this Court (Return p. 4). On the other hand Plaintiffs argue that the Aunqualified, bright-line rule@ that venue is determined as the case stands when the plaintiff brings the case against original or added defendants, as stated in *Linthicum* and *DePaul*, should be reexamined (Return p. 7-12).[1] Plaintiffs= arguments are self-defeating. This Court has clearly established when venue is to be determined. *DePaul*; *Linthicum*. Defendants= right to proper venue should not be taken lightly. *Green*, at 678; *Litzinger v. Pulitzer Publishing Co.*, 356 S.W.2d 81, 88 (Mo. 1962). Respondent has disregarded this Court=s rulings. Now Plaintiffs suggest those rulings should be reexamined and expanded. Plaintiffs cannot credibly argue that there is no clearly established and presently existing right determined by this Court. Plaintiffs= novel, self-serving suggestion that *DePaul*, *Linthicum*, and Rule 55.33(c) should be reexamined and enlarged does not make the holdings or Rules of this Court any less clear or less established.

Plaintiffs also suggest that adhering to *DePaul* and *Linthicum* will result in a harsh rule regarding venue. The rule requiring plaintiffs to proceed in a venue based on the parties they

[1]Under a heading ARespondent=s Determination of Venue on the Basis of Plaintiffs= Amended Pleading is Consistent with Linthicum and ' 508.010@

name and the claims they choose when filing is not harsh in any way. It is certainly no more harsh than the rule that defendants waive objection to venue if not raised at the first opportunity. Rule 51.045; *State ex rel. Uptergrove v. Russell*, 871 S.W.2d 27, 29 (Mo. Ct. App. 1993) (rehearing and transfer denied). In fact, it is decidedly less harsh because plaintiffs are not as limited in their time to prepare for filing cases, as defendants are in their time to answer. And the rule in *DePaul* and *Linthicum* does not deter the disposition of litigation on the merits.

It cannot be seriously argued that plaintiffs are subject to harshness by trying their cases in a proper venue, as determined by statute to provide a convenient, logical, and orderly forum for litigation. *Linthicum*, at 857. Unwary defendants, however, may be forced to try claims against them in improper venues, due to a single procedural misstep. *Uptergrove*.

Plaintiffs appear to be asserting an erroneous argument that they are entitled to choose any venue throughout the state. But *Barrett v. Missouri P. R. Co.*, 688 S.W.2d 397 (Mo. Ct. App. 1985), reminds that principles of jurisdiction and venue do not confer an unlimited right in the plaintiff to select the forum. *Id.* at 399. Plaintiffs are limited to a choice between proper venues.

Plaintiffs also resort to the popular ›judicial glut‹ argument in suggesting that adhering to *DePaul* and *Linthicum* will only lead to plaintiffs dismissing and refiling their actions. However, when transferred to a proper venue, that circuit court would retain jurisdiction over the matter to the exclusion of all other courts. *State ex rel. Catholic Charities of St. Louis v. Hoester*, 494 S.W.2d 70, 72-73 (Mo. 1973); and see *State ex rel. Buchanan v. Jensen*, 379 S.W.2d 529, 531-532 (Mo. banc 1964); *State ex rel. Standefer v. England*, 328 S.W.2d 732,

735 (Mo. App. 1959); *State ex rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391, 394 (Mo. banc 1975); *State ex rel. Palmer v. Goeke*, 8 S.W.3d 193, 195 (Mo. Ct. App. 1999); *Baker v. Baker*, 804 S.W.2d 763, 767 (Mo. Ct. App. 1990). Plaintiffs point to no evidence of increased judicial burden attributable to cases being dismissed and refiled since *DePaul* and *Linthicum* were decided. Moreover, if Plaintiffs wanted to dismiss and refile their pleadings, for whatever reasons, they should be subject to the same consequences as any litigant who so chooses: paying the filing fees; invoking Rule 67.02(a)(1) & (2), Rule 67.02(d) (Appx. A9), and emphasizing their creation of dubious claims since initially filing.

Relators are entitled to a writ of mandamus enforcing this Court=s clear, unequivocal, and specific rules protecting the right to proper venue. *DePaul, Green.*

II. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE THE RELATION BACK DOCTRINE DOES NOT ALTER DETERMINATION OF VENUE AS CASES STAND WHEN BROUGHT, IN THAT RELATION BACK DEALS WITH CHANGES OF PARTIES, NOT CLAIMS, AND DEALS WITH STATUTES OF LIMITATION, NOT VENUE.

A. The Doctrine of Relation Back

Respondent=s Answer/Return relies almost entirely on the concept of Relation Back. Plaintiffs interpret Relation Back to suggest that this Court should unwind precedent and allow Missouri plaintiffs to change venue at any time by amending petitions to add new claims. Relation Back is a doctrine regarding statutes of limitation. *Bailey v. Innovative Management & Inv.*, 890 S.W.2d 648, 650 (Mo. 1994). Relation Back is not a doctrine addressing venue.

Id; See also *Smith v. Tang*, 926 S.W.2d 716, 719 (Mo. Ct. App. 1996).

Prior to 1973, it was held that an amended pleading does not relate back to avoid statute of limitations deadlines if the proof necessary to support the pleading as amended was different from the proof necessary to support the same pleading before such amendment. *Arpe v. Mesker Brothers Iron Company*, 323 Mo. 640, 648, 19 S.W.2d 668, 670 (1929) (superseded and overruled by *Koerper & Co. v. Unitel International, Inc.*, 739 S.W.2d 705, 706 (Mo. 1987)).

Rule 55.33 was adopted in 1973 (Appx. A7). Rule 55.33(c) expanded the scope of Relation Back, so that whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading for statute of limitations purposes. *Koerper & Co.*, at 705-706. Rule 55.33(c) does not state that an amendment relates back for purposes of determining venue. Plaintiffs also overlook the fact that Rule 55.33(c) **B** Relation Back **B** applies only to amendments changing the party against whom a claim is asserted. *Windscheffel v. Benoit*, 646 S.W.2d 354, 356 (Mo. 1983); See also *Smith v. Overhead Door Corp.*, 859 S.W.2d 151, 152 (Mo. Ct. App. 1993). Plaintiffs have not sought to change any of the parties against whom they assert their eight various claims. They seek to add claims against the originally named defendants for the admitted purpose of affecting venue. Relation Back is, simply, not applicable.

Despite the fact that Relation Back does not affect the determination of venue, the claim of fraudulent inducement **B** which is the one claim Plaintiffs attempt to add to establish venue in Buchanan County **B** does not arise out of the conduct, transaction, or occurrence set forth or

attempted to be set forth in the original pleading. Respondent=s Return alleges, APlaintiffs= cause of action would not have arisen but for Bailey=s conduct in violating his non-compete agreements@ (Return p. 12). Plaintiffs also argue, A[a] breach of contract claim and fraudulent inducement to contract claim are separate and distinct claims involving two separate wrongs.@ (Return p.18). Plaintiffs= original petition asserts claims for breach of contract, but makes no mention of a separate claim of fraudulent inducement (Exhibit A).

Respondent=s Return then argues, without support, that Plaintiffs= allegations of fraudulent inducement were Apreviously overlooked.@ As is customary in cases of this nature, the attorneys for Plaintiffs in the underlying case have briefed and argued the matter on behalf of Respondent.[2] However, Plaintiffs offer no affidavits or other evidence that the fraudulent inducement claim was previously Aoverlooked.@ Plaintiffs did not assert that the claim of fraudulent inducement was overlooked when responding to Defendants= motion to transfer venue in the Buchanan County Circuit Court (Exhibit E). And Plaintiffs did not assert that the claim of fraudulent inducement was overlooked when responding to Defendants= writ petition in the Court of Appeals (Exhibit L). In fact, Plaintiffs= counsel states at hearing AThe mess-up on venue primarily was due to a mistake in the statute that was designated, with the long-arm statute...@ (Exhibit G-189: 17-19).

Neither the relation back doctrine nor any other theory offered by Plaintiffs work to alter the rule that venue is determined as a case stands when brought. *DePaul; Linthicum*.

III. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE PLAINTIFFS=

FRAUDULENT INDUCEMENT CLAIM WOULD NOT ACCRUE IN BUCHANAN COUNTY, IN THAT A CAUSE OF ACTION "ACCRUES" WHEN THE RIGHT TO MAINTAIN A SUIT ARISES, AT THE PLACE WHERE THE WRONGFUL CONDUCT CAUSING INJURY OR DAMAGE OCCURRED.

A. Venue for Fraudulent Inducement Claim Would Be in Clinton County

Plaintiffs= argument regarding Relation Back is unsupported. Notwithstanding, the argument is futile. Venue for Plaintiffs= newly alleged tort would be outside Buchanan County, pursuant to ' 508.010(6) RSMo. (Appx. A3).

Respondent=s Return argues offhandedly that APlaintiffs= fraudulent inducement claim is a tort claim that arose in Buchanan County.@ p.5. Plaintiffs do not support their conclusive argument in Respondent=s Return. Nor do they controvert the facts supporting that venue would lie in Clinton County.

If Plaintiffs= fraudulent inducement claim were originally overlooked by Plaintiffs= counsel, and *if DePaul, Linthicum*, and 508.010 RSMo. were abandoned as Plaintiffs suggest, so that venue could be determined after an amendment stating new claims, and *if* Respondent were to have jurisdiction to grant a contested motion to amend, filed i n an admittedly improper venue where the judge has no jurisdiction except to perform the ministerial task of transfer to a proper venue, Plaintiffs= claim of fraudulent inducement, would nevertheless, not establish venue in Buchanan County.

Plaintiffs were not allegedly injured until Mr. Bailey allegedly breached his non-

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[2]*See State ex rel. Hardin v. Sanders*, 538 S.W.2d 336, 337 (Mo. 1976).

compete agreement by working with a competitor in Lathrop, Clinton County, Missouri. Plaintiffs offer no valid legal support for their contention that a tort of fraudulent inducement is completed before the defendant breaches any agreement or the plaintiff suffers any damage. Plaintiffs argue, without authority, that a cause of action for fraudulent inducement accrues when and where a promissor makes promises he or she allegedly knows he or she does not intend to keep in the future. Plaintiffs offer nothing to refute the fact that a cause of action for fraudulent inducement does not accrue until the promissor allegedly breaches his or her promise and the other party to the agreement suffers damage. *Trimble v. Pracna*, 167 S.W.3d 706, 712 (Mo. 2005) (damage is one of nine essential elements of fraud and failure to establish any one is fatal to action); *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988).

A cause of action Aaccrues@ when the right to maintain a suit arises. *Brink v. Kansas City*, 358 Mo. 845, 850 (1949). For venue purposes, a cause of action Aaccrues@ at the place where the wrongful conduct causing injury or damage occurred. *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 436 (Mo. banc 1984); and see *State ex rel. Drake Publishers v. Baker*, 859 S.W.2d 201, 204 (Mo. Ct. App. E.D. 1993).[3] Respondent=s Return argues, APlaintiffs= cause of action would not have arisen but for Bailey=s conduct in violating [sic] his non-compete agreements.@ (Return p. 12). Plaintiffs= counsel=s argument acknowledges that Plaintiffs= alleged claim could not accrue until Plaintiff could bring a cause of action B after Mr. Bailey allegedly breached his non-compete agreement. Plaintiffs allege that Mr. Bailey=s wrongful conduct B Aviolating his non-compete agreement@ B occurred in Lathrop, Missouri.

Accordingly, venue for Plaintiffs= fraudulent inducement claim would be in Clinton County, Missouri.

But because the trial court had no jurisdiction to grant Plaintiffs= motion to amend (or do anything but perform the ministerial act of transfer to a proper venue), and venue is nevertheless determined as the case stands when brought, this Court need not reach the determination of proper venue for Plaintiffs= allegations of fraudulent inducement (see failure to state a claim for fraudulent inducement argument, *aftra*). Determining the proper venue for the alleged fraudulent inducement is not necessary to make the writ absolute and order the cause transferred to a proper venue for such determinations.

IV. RELATORS ARE ENTITLED TO AN ORDER REQUIRING RESPONDENT TO TRANSFER THE CAUSE TO A PROPER VENUE, BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM OF FRAUDULENT INDUCEMENT, IN THAT A BREACH OF CONTRACT CLAIM CANNOT BE CONVERTED INTO A TORT, AND PLAINTIFFS CANNOT STATE FRAUD WITH PARTICULARITY, CANNOT STATE DAMAGES, AND CANNOT STATE JUSTIFIABLE RELIANCE.

Plaintiffs originally claimed venue was proper in Buchanan County under the long-arm statute, ' 506.500 RSMo. (Exhibit G-2, & 2). However, all Defendants are Missouri residents and the long-arm statute is inapplicable. Plaintiffs asserted venue in Buchanan County because the allegedly breached contracts had a Anexus@ in St. Joseph, Buchanan County, Missouri. *Id.*

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[3]Cited by *Beyersdorfer v. Beyersdorfer,* 59 S.W.3d 523, 526 (Mo. 2001).

Plaintiffs stipulate venue is improper in Buchanan County as the case stood when brought. After Defendants= motion contesting venue, Plaintiffs moved to amend to add two tort claims (Exhibit F-118). Now Plaintiffs claim venue under ' 508.010(6) RSMo., the Atort@ subsection of the Missouri venue statute (Appx. A3).

Despite not establishing venue in Buchanan County, Plaintiffs cling to their proposed amended petition in arguing that it states a claim for fraudulent inducement. But, Plaintiffs argue that the remedy for failing to state fraud with particularity is a motion for more definite statement (Return pp. 14-17). Plaintiffs cannot refute that allegations of fraud must be pled with particularity under Rule 55.15 in order to state a claim (Appx. A12). *Batek v. Univ. of Mo.*, 920 S.W.2d 895, 900 (Mo. 1996). Or that where Plaintiffs= amended petition does not state facts to support or infer either justifiable reliance or damages, it fails to state a claim for fraudulent inducement. *Trimble v. Pracna,* 167 S.W.3d 706, 712 (Mo. 2005) (damage is one of nine essential elements of fraud and failure to establish any one is fatal to action); *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988).

Likewise, Plaintiffs do not attempt to address the holding in *O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700 (Mo. Ct. App. 1999), that Astatements and representations *as to expectations and predictions for the future* are insufficient to authorize recovery for fraudulent misrepresentation.@ *Id.* at 703 (emphasis added). Or that A[w]hen a tort arises from the breach of a contract, a plaintiff is precluded from maintaining both a breach of contract and a fraud claim ... [a] fraud claim is permitted only if it arises from acts that are separate and distinct from the contract.@ *Id.* at 702. Here, the alleged representations of Mr. Bailey are precisely the same representations in the contract which Plaintiffs allege were breached (Exhibit F).

Plaintiffs allege Mr. Bailey did not intend to fulfill his promises of actions or inactions to be performed in the future. Plaintiffs cannot state a claim for fraud predicated on representations or statements which involve things to be done or performed in the future. *Yerington v. Riss*, 374 S.W.2d 52, 58-59 (Mo. 1964).

Plaintiffs attempt to cloak a breach of contract claim as a tort of fraudulent inducement, for the admitted purpose of establishing venue in Buchanan County (Exhibit G-187: 2-5; Return p. 5). The Court should not countenance such a legal two-step. This Court has an opportunity to make a clarification for all: Plaintiffs in Missouri cannot subvert decades of precedent that distinguishes between contracts and torts, by claiming, without alleging any supporting facts, that a promissor planned to breach his contract when he or she entered into it. *Id*; and see *Dillard v. Earnhart*, 457 S.W.2d 666, 671 (Mo. 1970).

There is no objective allegation of fact even remotely suggesting that Mr. Bailey could not keep his promises when he entered into his contract, or that he did not intend to abide by them in the future. Indeed, Plaintiffs argue that A[a] dishonest person would not have mentioned any desire to work for a competitor.@ (Return p. 16).

Likewise, there is no allegation of fact suggesting that Plaintiffs were damaged by Mr. Bailey=s alleged fraudulent statements. Plaintiffs do not state how they were damaged by entering into a contract with Mr. Bailey to buy his business or employ his services. They may be able to allege, in theory, some damage resulting from an alleged breach of a contract. But they state no separate damage that allegedly resulted from entering into the contract.

Finally, Plaintiffs cannot refute that their proposed amended petition states no objective allegation of fact supporting justifiable reliance. The facts alleged by Plaintiffs establish that

they did not rely on Mr. Bailey=s alleged representations. Instead, Plaintiffs required a writing which subsumed the alleged representations and prescribed damages and other relief. Plaintiffs= Employment Agreement states, A*This Agreement constitutes and expresses the whole agreement and all representations between Employer and Employee with respect to the subject matter hereof, all promises, understandings or representations relative thereto being herein merged* except that this Agreement shall not supplant the terms of the Share Interest Option Agreement and of the Buy-Sell Agreement@ (Exhibit F-150 & 12(a) (emphasis added)). Likewise, Plaintiffs= Asset Purchase Agreement contains a similar clause (Exhibit F-164, & 10(a)). Plaintiffs do not sufficiently plead justifiable reliance. *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 174 (Mo. Ct. App. 1998) (pleader cannot merely conclude that it had the right to rely on the alleged misrepresentation to survive a motion to dismiss).

With no objective evidence that Mr. Bailey could not or did not intend to keep the promises in the contract, other than the facts known to Plaintiffs at the time of contracting, Plaintiffs only speculate from the circumstances that Mr. Bailey allegedly did not intend to keep his promises. Those same circumstances were known to Plaintiffs at the time of contracting and therefore, even under their unsupported theory, Plaintiffs could not justifiably rely on Mr. Bailey=s representations.

Plaintiffs= proposed amended petition is fatal on at least three of the requisite elements for fraud, and therefore fails to state a claim for fraudulent inducement. *Trimble* at 712. Because venue was admittedly improper, Respondent had no jurisdiction to act prior to amendment. *Green*, at 678 (a court that acts when venue is improper acts in excess of its jurisdiction). And because Plaintiffs= only basis for arguing venue in Buchanan County is their

newly alleged fraudulent inducement claim, Respondent has no jurisdiction to act after amendment. *Id.*

CONCLUSION

Plaintiffs attempt all manner of arguments to avoid proper venue. None of the arguments, however, change the fact that Respondent acted outside his jurisdiction. Or that venue is improper in Buchanan County.

WHEREFORE, Relators respectfully submit that the alternative writ of mandamus entered in this action be made absolute and peremptory.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of November, 2005, a true copy of Relators' Brief in Support of Writ of Mandamus was sent by e-mail and U.S. Mail, to:

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Buchanan County Courthouse
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_____
Fritz Edmunds, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), I hereby certify that Relators: Brief complies with the limitations contained in Rule 84.06(b). The number of words in the brief is 4908, according to the word count of WordPerfect, Version 8, the word-processing system used to prepare the brief.

I also certify that the diskette submitted herewith to the Court, contains Relators: Brief in WordPerfect, Version 8 (and Acrobat PDF format), and has been scanned by an updated version of Norton Antivirus, and contains no viruses.

Respectfully Submitted,

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APPENDIX

Mo. Const. Art. V, ' 4 (2005)

' 4. Superior courts to control inferior courts--courts administrator, salary--reapportionment commission, appointment

1. The supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power.

2. The supreme court may appoint a state courts administrator and other staff to aid in the administration of the courts, and it shall appoint a clerk of the supreme court and may appoint other staff to aid in the administration of the business of the supreme court. Each such appointee shall serve at the pleasure of the court. The clerk's and administrator's salary shall be fixed by law. All other appointees shall have salaries fixed by the court within the legislative limits of the appropriation made for that purpose.

3. In the event that six commissioners of the supreme court are not available to sit as a reapportionment commission as provided in sections 2, 3 and 7 of article III of the constitution of this state, a commission composed of six members appointed by the supreme court from among the judges of the court of appeals, shall serve in lieu of the commissioners of the supreme court. No more than two members of any division of the court of appeals shall be appointed to the commission.

' 476.410 R.S.Mo. (2005)

' 476.410. Transfer of case filed in wrong jurisdiction

The division of a circuit court in which a case is filed laying venue in the wrong division or wrong circuit shall transfer the case to any division or circuit in which it could have been brought.

' 508.010 R.S.Mo. (2004)

' 508.010. Suits by summons, where brought

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state;

(5) Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found;

(6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and may be served in any county within the state; provided, however, that in any action for defamation or for invasion of privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion was first published.

S.Ct. Rule 51.045 (2004)

51.045. Transfer of Venue When Venue Improper

(a) An action brought in a court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed within sixty days of service on the party seeking transfer. For good cause shown, the court may extend the time to file a motion to transfer venue or allow the party to amend it.

If a motion to transfer venue is not timely filed, the issue of improper venue is waived.

(b) Within thirty days after the filing of a motion to transfer for improper venue, an opposing party may file a reply. For good cause shown, the court may extend the time to file the reply or allow the party to amend it.

The reply shall set forth the basis for venue in the forum. The court shall not consider any basis not set forth in the reply, nor shall the court consider allegations relating to fictitious defendants. If a reply is filed, the court may allow discovery on the issue of venue and shall determine the issue.

(c) If the issue is determined in favor of the movant or if no reply is filed, the court shall order a transfer of venue to a court where venue is proper. When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered. If a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred.

(d) A request for transfer of venue under this Rule 51.045 shall not deprive a party of the right to a change of venue under Rule 51.03 if the civil action is transferred to a county

having seventy-five thousand or fewer inhabitants. A party seeking a change of venue under Rule 51.03, after transfer of venue pursuant to this Rule 51.045, shall make application therefor within the later of:

(1) The time allowed by Rule 51.03, or

(2) Ten days of being served with notice of the docketing of the civil action in the transferee court as provided by Rule 51.10.

S.Ct. Rule 55.33 (2004)

55.33. Amended and Supplemental Pleadings

(a) A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

S.Ct. Rule 67.02 (2004)

67.02. Voluntary Dismissal--Effect of

(a) Except as provided in Rule 52, a civil action may be dismissed by the plaintiff without order of the court anytime:

(1) Prior to the swearing of the jury panel for the voir dire examination, or

(2) In cases tried without a jury, prior to the introduction of evidence.

A party who once so dismisses a civil action and thereafter files another civil action upon the same claim shall be allowed to dismiss the same without prejudice only:

(1) Upon filing a stipulation to that effect signed by the opposing party, or

(2) On order of the court made on motion in which the ground for dismissal shall be set forth.

(b) Except as provided in Rule 67.02(a), an action shall not be dismissed at the plaintiff's instance except upon order of the court upon such terms and conditions as the court deems proper.

(c) A voluntary dismissal under Rule 67.02(a) shall be without prejudice unless otherwise specified by the plaintiff. Any other voluntary dismissal shall be without prejudice unless otherwise specified by the court or the parties to the dismissal.

(d) If a plaintiff who has once dismissed a civil action in any court commences a civil action based upon or including the same claim against the same defendant, the court may make an order for the payment of any unpaid costs of the civil action previously dismissed. In addition, if the plaintiff dismissed the previous civil action without prejudice within ten days of the date set for trial, the court may make an order for the payment of witness and other

expenses, not including attorney fees, incurred by any other party that are caused to be incurred for the second trial because of the dismissal without prejudice of the previous civil action. The court may stay the proceedings in the civil action until the plaintiff has complied with any such order.

S.Ct. Rule 84.22 (2004)

84.22. Granting Original Writs

(a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.

(b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22(b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

S.Ct. Rule 55.15 (2004)

55.15. Particularity Required in All Averments of Fraud or Mistake

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and any other condition of mind of a person may be averred generally.